



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 814 of 2000**

JOHN NGANGA GACHUKI.....1<sup>ST</sup> PLAINTIFF

VERONICA NGATHA GACHUKI.....2<sup>ND</sup> PLAINTIFF

VERSUS

JOSEPH KURIA KIHANYA.....1<sup>ST</sup> DEFENDANT

DOMINIC MBURU KIHANYA.....2<sup>ND</sup> DEFENDANT

BENSON KIHANYA NDUNGU.....3<sup>RD</sup> DEFENDANT

PAUL NGANGA KIHANYA.....4<sup>TH</sup> DEFENDANT

JAMES KAMAU KIHANYA.....5<sup>TH</sup> DEFENDANT

AGNES MUGURE KIHANYA.....6<sup>TH</sup> DEFENDANT

**RULING**

When this case came up for hearing on 15<sup>th</sup> February, 2010 the learned counsel for the defendants filed a preliminary objection to the effect that;

1. **The suit herein is incompetent, devoid of merit hence this honourable court lacks jurisdiction to entertain the same.**
2. **The suit herein seeks relief against a party who is not subject to the suit contrary to mandatory provisions of the law hence the same is null and void,**
3. **The prayers sought by the plaintiffs cannot be enforced as against the defendants and as such the suit ought to be dismissed in the first instance and,**
4. **The suit herein is not only incompetent and devoid of merit but also amounts to miscarriage of justice as it seeks for prayers that are untenable in law and contrary to provisions of Order 1 rule 3 of the Civil Procedure Rules (sic) Chapter 21 Laws of Kenya.**

On the basis of the foregoing, the defendants prayed for a dismissal of the entire suit with costs. To that objection the plaintiffs filed grounds of opposition on the grounds that;

1. **The reliefs sought by the plaintiffs are tenable in law contrary to the averments in the preliminary objection at paragraph 4,**
2. **The court has unlimited and original jurisdiction to determine the issues herein.**
3. **The plaintiffs seek to reserve and determine ownership of the subject property hence a cause of action determinable by this honourable court.**
4. **The suit has merit as properly found in the award of the Land Disputes Tribunal dated 6<sup>th</sup> January, 1998 and,**
5. **The suit complies with Order 1 Rule 3 contrary to the averments contained in the preliminary objection.**

Following the said intervention the case was taken out of the hearing list and counsel undertook to file submissions to address the preliminary objection. This has been done.

I have related the preliminary objection to the pleadings and considered the submissions of both learned counsel. This is not the first notice of preliminary objection that has been raised by the defendants because, the record shows that there is another notice of preliminary objection dated 5<sup>th</sup> May, 2000 and filed on 8<sup>th</sup> May, 2000. In that objection the defendants undertook to raise a preliminary objection on jurisdiction and on the fact that the matter is *res judicata*.

The record does not contain any proceedings that addressed the said notice and I take it that the said notice is still in place and has not been determined. What is clear however is that, the plaint has been amended once or twice and the defendants filed a defence to the said amended plaint. In the statement of defence dated 31<sup>st</sup> October, 2000 the defendants at paragraph 8 clearly states that, **“the Jurisdiction of this honourable court is admitted”**.

I have not seen anywhere in this record where that admission has been discounted. It is therefore, perplexing how and why the same parties can now, about ten years down the line, allege that this court has no jurisdiction. The parties have complied with the pretrial steps of exchange and inspection of documents, and also agreed on the issues for determination by the court. Those issues are dated 22<sup>nd</sup> February, 2010. I note that the said issues were filed after the objection had been raised before this court. In the statement of agreed issues signed by both learned counsel for the plaintiffs and the defendants respectively, the issue of jurisdiction is not one of them. With profound respect therefore, the filing of the notice of preliminary objection is not only misconceived but intended to delay the expeditious determination of this suit. In fact, that delay has already been occasioned because, that objection was raised on the date the suit was supposed to be heard.

I must place it on record that this court detests such steps which clearly are intended to frustrate disposal of matters placed before the court. I have no hesitation to order, which I hereby do, that the said preliminary objection is

hereby dismissed with costs to the plaintiffs to be paid by the defendants before the next hearing date.

Orders accordingly.

*Dated, signed and delivered at Nairobi this 27<sup>th</sup> day of July, 2010.*

**A. MBOGHOLI MSAGHA**  
**JUDGE**